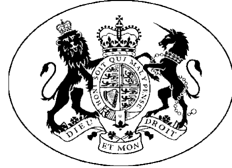

EMPLOYMENT TRIBUNALS

Claimant: **Mr P Porchetti**

Respondent: **Brush Electrical Machines Ltd**

Heard at: **Midlands East Region via CVP**

On: **8, 9, 10, 11 and 12 March 2021; 24, 25 and 26 May 2021**
Reserved to 27 May 2021

Before: **Employment Judge Victoria Butler**
Members: **Mr A Blomefield**
Mr C Bhogaita

Representation:
Claimant: **Mr D Jones, Solicitor**
Respondent: **Mr M Salter, Counsel**

This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was v – video. It was not practicable to hold a face to face hearing because of the COVID 19 pandemic.

RESERVED JUDGMENT

The unanimous decision of the Employment Tribunal is

1. The Claimant's claim of unfair dismissal succeeds in that it was procedurally unfair. His entitlement to a basic award is reduced by 100% by reason of contributory fault. His entitlement to a compensatory award is reduced by 100% by reason of a *Polkey* deduction.

2. The Claimant's claim of direct race discrimination is not well-founded and is dismissed.

3. The Claimant's claim of unauthorised deductions from wages for the period 4 – 18 July 2019 is well-founded and succeeds. Compensation will be determined at a remedy hearing if the parties cannot determine the amount due between themselves.

REASONS

Background

1. The Claimant presented his claim to the Tribunal on 6 November 2019 after a period of early conciliation between 20 September 2019 and 3 November 2019. He was employed as a Regional Sales Director from 5 October 2015 until his dismissal following the breakdown of settlement agreement discussions. He claims unfair dismissal, direct race discrimination and unauthorised deductions from wages.

2. This case was subject to two preliminary hearings ("PH") prior to the substantive hearing. The first was held on 27 January 2020 to identify the issues and make case management orders. The second took place on 7 April 2020 to decide:

    i. whether the Claimant should be required to pay a deposit in relation to his race discrimination claim;

    ii. whether the Respondent should pay a deposit in respect of the argument that the Claimant's dismissal was procedurally fair, despite it not adhering to the ACAS Code of Practice;

    iii. Whether it was still necessary to have a preliminary hearing to determine whether without prejudice material was admissible ("the admissibility issue"); and

    iv. Whether there should be any sanction in respect of the Respondent's failure to reply fully to the Claimant's request for further and better particulars of the Response.

3. Employment Judge Hutchinson ("EJ Hutchinson") declined to make a deposit order in respect of the Claimant's race discrimination claim and given that Respondent conceded that the Claimant's dismissal was procedurally unfair, it was no longer necessary to consider a deposit order in this regard.

4. EJ Hutchinson set down a further PH to determine the admissibility issue and ordered the Respondent to reply to the Claimant's request for further and better particulars.

5. Subsequently, the Respondent agreed to waive privilege and the preliminary hearing to determine the admissibility issue was vacated. It also responded to the request for further and better particulars. One request was for it to provide '*further particulars of the nationalities of expatriate employees in Brush Electrical Machines Limited*'. The Respondent provided the relevant information which confirmed that out of sixty-five expatriate employees, seven are British and one Italian.

The Issues

6. During the course of this hearing we asked the parties to provide a comprehensive list of issues which was duly provided on 26 May 2021. They are copied as follows:

"INTRODUCTION AND OVERVIEW

1. *This list of issues is prepared in response of the Tribunal's request of 24th May 2021. In accordance with the Tribunal's indication that the hearing will focus on liability only, these reasons are limited to issues requiring determination at this stage.*

LIST OF ISSUES

Jurisdiction

Time/limitation issues

2. *Were all of the Claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA") and 111(2)(a) & (b) of the Employment Rights Act 1996 ("ERA")]? Dealing with this issue may involve consideration of subsidiary issues including: whether there was whether it was not reasonably practicable for a complaint to be presented within the primary time limit; whether time should be extended on a "just and equitable" basis. The relevant dates are:*

   (a) *May 15th 2019: Claimant's evidence that dismissed (Porchetti §132);*
   (b) *June 16th 2019: Claimant's answers to Employment Judge's Questions*
   (c) *3rd July 2019: Respondent says employment ends;*
   (d) *July 18th 2019: dates Claimant's claim form says dismissed [1/5 §5.1]*
   (e) *20th September 2019 ACAS A [1/1]*
   (f) *3rd November 2019 ACAS B [1/1]*
   (g) *6th November 2019 ET1 [1/2]*

3. *Given the Claimant's evidence the application for Mandatory Conciliation and Claim Form has been presented out of time date. Both should have occurred by 14th August 2019.*

Unfair dismissal

Qualification

4. *The Respondent accepts the Claimant:*
   (a) *was an employee;*
   (b) *was dismissed, and that,*

(c) *at the time of his dismissal had sufficient continuity of employment to present a claim of unfair dismissal.*

Reason for the Dismissal

5. *What was the reason for the dismissal? The Respondent asserts that it was a reason related to capability, which is a potentially fair reason for section 98(2) Employment Rights Act 1996.* **NB: The Respondent clarified that if the Claimant was dismissed on 17 May 2019 (as suggested by him during the course of the hearing) the reason for dismissal was capability. If his dismissal occurred in July 2019, the reason was for 'some other substantial reason'**.

6. *The Claimant does not accept that this is the real reason for his dismissal which he contends was because of his race.*

Procedural Fairness

7. *The Respondent accepts it did not follow a procedure when dismissing the Claimant and so the Claimant's dismissal was procedurally unfair [1/65 §1].*

Polkey Reduction

8. *The Respondent accepts it did not follow a procedure. Would the Claimant have been fairly dismissed in any event, and/or to what extent and when? The Respondent contends that it:*

   (a) *could have fairly dismissed in these circumstances, with the reason for dismissal being capability;*
   (b) *would have fairly dismissed had it conducted a fair process.*

Contributory Fault

9. *If the dismissal was unfair, did the Claimant cause or contribute to the dismissal by culpable or blameworthy conduct? If so, is it just and equitable to reduce any award and, if so, in what amount? The Respondent contends the Claimant's poor performance caused his dismissal.*

<u>Equality Act 2010 Claims</u>

Protected Characteristic:

10. *The Claimant:*
   (a) *relies upon the protected characteristic of race;*
   (b) *relies on nationality;*
   (c) *is Italian.*
   (d) *Is non British*

Section 13: Direct Discrimination

11. *It is not disputed that the Respondent:*

    (a) *dismissed the Claimant;*
    (b) *did not follow a capability process when dismissing the Claimant;*

    and this is treatment falling within section 39 Equality Act.

12. *Did the Respondent treat the Claimant less favourably than it treated or would have treated a comparator who is not in materially different circumstances? The Claimant relies on Mark Alvey [1/63 §3.2] and a hypothetical comparator. The Respondent says Mr Alvey is not an appropriate comparator.*

13. *Has the Claimant shown evidence that the reason for his dismissal was he was not a British national? [1/63 §3.3] Can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic? The Claimant relies on the following acts as background facts:*

    (a) *C's workload being a significant contributing cause/significant influence on the issues relied upon by R and the personal objectives contained within the Quarterly Bonus Incentive Results?*

    (b) *C relies on the resource provided to him affecting his workload?*

    (c) *C says that he was provided with less resource to undertake his role than his British predecessor, successor and proportionally less than the British RSD in EMEA?*

    (d) *C says that he was provided with less resource then was that because of race?*

    (e) *If C was provided with less resource because of race and C's workload was a contributing factor in the performance issues relied upon, then race will have been a contributing cause of C's dismissal.*

    (f) *C says that his sales performance was better than MA and PH (both British)*

    (g) *The dismissal of a Czech (non British) sales manager in PH's region for performance, whilst MA survived dismissal when not performing. Also different treatment of the sales directors with poor performing sales managers*

(h) C disputes that his 2018 sales performance in 2018 was achieved by 'luck' as claimed by R.

(i) C says that APAC was not the worst performing region as claimed by CL.

(j) C relies on R's non-disclosure of PH's sales results and other documents.

(k) C will rely on R's criticism of him for pipeline reporting in February 2019 which he said was specific to the Claimant. The Claimant says that MVS's criticism was aimed at the other two RSD, including P Higgs.

(l) R recruited a British RSD as C's successor.

(m) The sales targets (both personal and territory) were reduced for C's British successor in 2020 and he was immediately provided with additional resource that C had requested.

(n) Changes to the reasons provided for C's dismissal from business performance, engagement, and relationships with third parties, to specific individual concerns. R now says that performance was never about 'the figures' but was always about his personal performance against personal objectives. This is despite CL's evidence being that C's pipeline was nonexistent and that the 'top line' was the business priority.

(o) Changes in the Respondent's witness evidence regarding the pipeline (CL saying it was non-existent and then when presented with documentary evidence changed to say it was not growing fast enough. MVS relying on the the pipeline not being sufficient to achieve targets and then saying the issue was about quality of pipeline and not quality.

(p) R's unreliable and unconvincing evidence

(q) R's reliance on issues without any supporting evidence eg relationship issues with colleagues.

(r) R's failure to follow any dismissal procedure.

(s) comments the Claimant claims were made by Christian Lordereau that: "he was Northern European rather than Southern European" and that was why he was angry the Claimant had arrived after 9AM to their meeting on 15th May 2019 (Porchetti §19 and §125);

(t) "generic complaints" by Marco van Schaik towards south-East Asians regarding their behaviour, trustworthiness and professionalism and referring to the Claimant becoming localized in response to CL's reference to the Claimant's arrival time on the morning of 15 May 2019 (Porchetti 20);

(u) the perception that the Claimant was "lazy" (hearing in February);

(v) No British employee being dismissed by letter without any capability process which is unreasonable and demands a credible explanation.

(w) A reduction in non-British ex pats

which the Claimant contends that these are capable of providing a foundation to draw an inference of discrimination by the Respondent when considering the claims.

14. *If the burden of proof is reversed, what is the Respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?*

Unauthorised Deduction from Wage

15. *What was the date of the Claimant's dismissal?*

16. *If later than the 3rd July, the Respondent accepts the Claimant is entitled to be paid wages from 3rd July 2019 to that date.*

The Hearing

7. The hearing was originally listed for four days on 8-11 February 2021 with day one as a reading day for the Tribunal. There was insufficient time to complete the evidence in the remaining three days and the case was re-listed for 23–26 May 2021. We made our reserved decision on 27 May 2021.

8. Prior to the hearing the parties presented an agreed bundle of documents and witness statements. During the course of the hearing the parties presented a chronology, an updated list of issues and closing submissions.

9. References to page numbers in these reasons are references to the page numbers in the agreed bundle.

The Evidence

10. We heard evidence from the Claimant and for the Respondent:

- Mr Marco Van Schaik, Executive Sales Director (who has dual Swiss and Dutch citizenship); and

- Mr Christian Lordereau, Group HR Director (who is French).

11. We heard evidence from the Respondent first and found Mr Van Schaik's and Mr Lordereau's evidence to be entirely credible. Their evidence under cross-examination was consistent with the Respondent's pleaded case and their written witness statements. Accordingly, we have no concerns with their evidence.

12. On the contrary, we found the Claimant to be excitable and his evidence was unreliable and defensive. He was unable to accept contemporaneous documentary evidence as reliable or accurate. By way of example, one of the major factors in the Claimant's dismissal was his poor performance. He disputed his performance was poor despite numerous emails contained within the bundles in which Mr Van Schaik clearly raised performance issues with him (as set out in our findings of fact below). The Claimant was adamant that he was performing well given that he met his sales target for 2018 but ignored that fact that he consistently failed to reach the minimum threshold for his additional personal objectives under the company's incentive plan.

13. In the face of documentary evidence clearly highlighting Mr Van Schaik's concerns with his performance, the Claimant spent much time in cross examination in essence making excuses for his performance, rather than acknowledging the facts before him.

14. Additionally, the Claimant's claim of direct race discrimination changed significantly from that pleaded in the originating claim to the one before us, thereby undermining his credibility. Overall, where there was a conflict in the evidence, we have preferred the evidence of the Respondent.

The Facts

Background

15. The Respondent is part of the Brush Group which manufactures and supplies turbo generators, power management systems, transformers and switch gear to a global market.

16. The Group is split into product sales and service sales. The Group's service sales organisation is divided by geographic regions - Americas, EMEA and Asia. Each region is managed by a Regional Sales Director ("RSD") to whom Regional Sales Managers ("RSM") report.

17. The Respondent also works with agents and distributors (known as Channel Partners) in each region who are managed by the RSD. Agents support the sales process and obtain a commission for their service. A distributor can buy services from the Respondent and can sell them at its own risk.

18. The Respondent employs people from a variety of different nationalities including Spanish, German, French, Mexican, South African, Polish, Greek, Serbian, Indian, Sri Lankan, Hungarian, Slovakian and Bulgarian. In 2020, there were

four employees in the Aftersales Team in APAC – two were British, one was Spanish and was Singaporean.

19. The Claimant commenced employment with the Respondent on 5 October 2015 as Sales Director–Asia. His annual salary was £110,000 per annum, he received a signing on bonus of £20,000, a car allowance of £9,600 per year, flights to Europe every six months to visit his family, and an accommodation allowance of £1,500 per month.

20. The Claimant signed a contract of employment (pages 116-127). In respect of the '*car allowance/company car*' it states that "*you must ensure that your own car is insured for business use, kept in a road worthy condition, taxed and is preferably four years old*". The Claimant also agreed to "*comply with the rules, policies and procedures of the company, although these do not form part of your contract of employment and are subject to change*".

21. The Respondent has a comprehensive expenses policy which provides:

> *"the purpose of this Standing Instruction is to define the company's policy on business expenses, and to establish and maintain a system for their control which also conforms to the requirements of the Melrose corporate policies, Inland Revenue legislation and National Insurance Acts……….all authorised expenses should be forwarded to the Finance Department as soon as possible on return from the trip, which should not exceed 14 days from the date of return*" (page 884).

22. The Claimant was required to seek advance approval of his expenses from his line manager, Marco Van Schaik.

23. At the material time, the other Regional Sales Directors were Paul Higgs (the Claimant's predecessor in APAC) and Liam Arnott.

The Claimant's employment

24. The Claimant is an Italian national. At the time of his appointment, he was based in London, but the Respondent invested significant cost in relocating him to Kuala Lumper where he would be based at the Respondent's regional office from 29 March 2016. He worked as part of a small sales team with one RSM, Mark Alvey, reporting directly to him. Mr Alvey was employed on a fixed-term contract which was subject to review annually. It was the Claimant's role to line manage Mr Alvey's performance.

25. The Claimant required a work permit to undertake his role in Kuala Lumper. The Respondent sought external legal advice in securing the visa and had to chase the Claimant for supporting information to no avail. The Respondent's HR Department e-mailed Mr Van Schaik directly on 26 May 2016 to seek assistance:

> "*I have been chasing Paulo since the beginning of May without any communication from him without any luck"* (page 153).

26. The Claimant was entitled to participate in the Respondent's bonus scheme. The plan allows for payments of incentives quarterly based on the Respondent's group order intake achievements. The Claimant was subject to individual order intake achievements and additional personal objectives were also set for him. In Q2, Q3 and Q4 of 2018 and Q1 of 2019 the Claimant failed to reach the minimum threshold for his personal objectives (more below).

27. On 30 January 2017, the Claimant was appointed as After Market Sales Director for the APAC region. He was responsible for overseeing service sales in the region and latterly reported to Mr Van Schaik, Executive Sales Director. Given the Claimant's seniority and the nature of his role, he was given a reasonable degree of independence in relation to how he undertook his duties and a high level of trust was placed in him. The role involved significant travel and included regular visits to key customers in Indonesia, Thailand, Australia and South Korea.

28. A key part of the Claimant's role involved dealing with the Company's agents and distributors in the APAC territory. He had relationships with two main distributors, one of which is based in Indonesia and the other in Singapore.

29. Another important element of the Claimant's role was to keep the Respondent's sales management system, known as BBP, up to date. The BBP records available opportunities for business in each territory with a requirement for each opportunity to be well forecasted to allow for capacity planning. When an opportunity is closed BBP is updated to reflect whether an opportunity was "*won or lost*" (page 538).

30. From early on in the Claimant's employment, it became apparent that he was not particularly effective at dealing with matters promptly. By way of example, he was late in submitting his expense reports on the Respondent's credit card. On 25 July 2016, the Respondent's Financial Accounting Manager emailed the Claimant as follows:

    "Despite numerous emails without any response, your company Barclay card analysis remains outstanding as follows:

    Can you please urgently submit them to David for approval if you have not already soon" (page 161).

31. This email was forwarded to Mr Van Schaik who emailed the Claimant and asked him to ensure that the expense reports were done before the end of the week:

    "*Also ensure any other expenses to be declared on a monthly basis going forward…"* (page 160).

32. The Claimant was quick to make an excuse and replied: *"hello Marco, I am really sorry about this reiterated delay, but I 'made the mistake' of postponing because of giving priority to 'real business tasks'. I have changed my approach to it recently, so it won't happen again"* (page 159).

33. Mr Van Schaik replied saying "*expense reports, like BBP etc are just an integral part of the job. In the beginning it might be a little troublesome but practice makes perfect. Just get in the routine…"* (page 159).

34. The Claimant was consistently poor at keeping the BBP up to date, causing immense frustration on Mr Van Schaik's part. By way of example, on 28 October 2018, Mr Van Schaik emailed the Claimant as follows:

> *"Attach list of opp is BBP for you and Mark.*
>
> *I see now a more equal distribution of workload (THANKS) however, still significant backlog of need for UPDATES. From your 175 opps, 101 show order date in the past. 56 have not been updated for more than one month! For Marks 1 2 3 Opps, 1 shows order date in the past.*
>
> *Please ensure we are not just only updating the close date, but also add comments (status and next actions) in the comment box. 27 have not been updated for more than one month.*
>
> *Please use the coming days to update properly.*
>
> *Green field means OK.*
>
> *Orange field means NEED IMPROVEMENT.*
>
> *Red field means POOR.*
>
> *As advised before, this is not good enough!...."* (page 431)

35. It also became apparent to Mr Van Schaik that the Claimant was not investing his time and energy effectively in dealing with the requirements of his role. He was often tardy in replying to customers and colleagues leading to Mr Van Schaik being contacted about his whereabouts. On 5 September 2017, John Neill, Head of Group Field Service, emailed Mr Van Schaik asking:

> *"is Paulo still responsible for Pakistan? He seems to have gone missing! This is a real opportunity for field service work*" (page 204).

36. On 5 October 2017, the Claimant was scheduled to attend a meeting with Mr Van Schaik in Zurich. He was asked to produce an agenda which he failed to do in advance. Rather, he hurriedly drafted and sent it to Mr Van Schaik whilst he was en route to Zurich. He arrived approximately two hours late because the first available direct train did not arrive in Zurich any earlier. The Claimant failed to advise Mr Van Schaik of this ahead of the meeting or arrange to travel the day before.

37. On 3 December 2017, Ian Dickson, Tendering and Field Service Engineer resigned from the Respondent. In his letter of resignation, he explained:

> *"I find myself spending more and more time at home, and feel underutilised and unchallenged in my role. After much thought and deliberation I have decided to find a role which will keep me more occupied, and challenge me to develop my skills further..."* (page 232).

38. In essence, there was insufficient work for Mr Dickson due to lack of orders in the territory supported by the Claimant. In response to Mr Dickson's resignation, the Claimant requested additional field service staff in APAC but failed to provide any justification for it. Mr Van Schaik replied:

> "*as the workload was not sustaining the role it is questionable if we should replace. Again, it is all about having a pipeline fully filled with opps and well forecasted…"* (page 233).

39. On 5 April 2018, Mr Van Schaik had cause to chase the Claimant's input into the Respondent's MD report. Mr Van Schaik reminded the Claimant:

> *"please put notes in your calendar to provide this within the first few days of every new period"* (page 365).

40. Mr Van Schaik was somewhat surprised to have to remind someone of the Claimant's seniority to set up calendar reminders.

41. That same day, Mr Van Schaik asked the Claimant to develop a value proposition for a client and provide it within two weeks. The Claimant failed to do so, and Mr Van Schaik had to chase for an update (page 370). It took the Claimant a further four days to provide it thereafter.

42. On 16 April 2018, Mr Van Schaik had to chase the Claimant for his input into a strategic plan saying:

> *"I now urgently need your input. Please advise"* (page 369).

43. The Claimant provided his input two days later which Mr Van Schaik considered inadequate. He wrote to the Claimant as follows:

> *"I still did not receive qualified input. The Exec team is meeting tomorrow afternoon. I need you to input in the next hour!"*

44. The Claimant provided further material the following day, which remained inadequate in Mr Van Schaik's view. He emailed the Claimant saying:

> *"now a lot of work done but it is little relevant to the strat plan for Asia – AMA. I see no territory plan, no suggested strategic incentives? Frankly speaking I am not impressed…"* (page 381 – 382).

45. Ultimately Mr Van Schaik did the bulk of the work himself (page 381).

46. On 19 June 2018, Mr Van Schaik had cause to chase the Claimant again in respect of an order intake and capture plan (page 397).

47. On 20 July 2018, the Claimant emailed Mr Van Schaik, copying in HR, confirming that he had decided to apply for an EMBA. He confirmed that the course was structured over twenty months with one weekend session per month and one weekly session per year. He explained that it would not conflict with his work and he would use his annual leave to attend the classes (page 398). The Claimant's intention was to re-locate to Hong Kong where his partner was residing. He mentioned this to Mr Van Schaik on a number of occasions who explained that the Respondent would not support a move because it did not have many customers in Hong Kong, whereas it had a number in Malaysia. Mr Van Schaik was concerned that if the Claimant moved, he would spend increased time travelling to customers which would impact on the Respondent in terms of not only the cost of travel but also the time available for the Claimant to spend on his work.

48. On 13 August 2018, the Claimant was advised of his incentive plan results for Q1 2018. The Claimant reached his individual order intake, but the sales team did not meet its threshold, nor did the Claimant meet the minimum threshold on his additional personal objectives. In fact, the Claimant scored only 35 out of a maximum of 125 points (pages 403 – 404).

49. On 16 August 2018, Mr Van Schaik emailed the Claimant in respect of Mr Alvey's performance. He asked the Claimant:

> *"so, the question is; what is Mark doing when not travelling, and not updating BBP? I suggest to get more specific on the day-to-day activities. Please advise what actions are being taken to improve pipeline?"* (page 405).

50. That same day, Mr Van Schaik emailed the Claimant about his incentive plan and review of his BBP status and pipeline.:

> *"total 155 opportunities of which 143 do not show a value (?) on opp level (?) this might just be a technicality. Twenty opp have been created in Q2 v 23 in Q1. However… from 155 opp, 59 have not been updated for over six weeks. 38 opp do not have any notes in the opp"… the pipeline is not sufficient to make the target for order intake 2018. Please advise what we are going to do about this?* (page 406).

51. On 8 October 2018, the Claimant was advised of his Q2 incentive plan results. Again, the sales team did not meet its threshold. The Claimant met his individual order intake but did not meet the minimum threshold on his additional personal objectives, scoring 50 out of a possible 125 points (pages 415 – 416).

52. On 23 October 2018, the Claimant emailed Mr Van Schaik about becoming RSD of Russia and the ex-Soviet Union countries. He said:

> *"when I joined Brush three years ago, I negotiated and agreed with an executive of the company some clauses. One of them was the RSD of Russia and the ex Soviet Union countries. In exchange of those countries*

I had to leave India and Sri Lanka which was ok with me. At the time you duly initiated the transfer of the mentioned countries, as well as the exchange of India, but as of today such transition has never been enforced.

I am of the opinion that deals must be respected at all levels and situations for they are the foundations of the relationship between employees and employer. Should not be the case then trust is heavily at stake.

I will let you take stock of the situation, but I clearly expect the enforcement of the initial agreement" (page 418).

53. Mr Van Schaik responded saying that he was happy with the status quo albeit concerned with the Claimant's use of language. He also commented:

> *"As advised before I would rather see further improvement in your present territory than expanding it*" (page 417).

54. On 28 October 2018, Mr Van Shaik undertook a BBP review for the Claimant and Mr Alvey. He was unsatisfied with the BBP overall and said

> *"as advised before, this is not good enough!"* (page 431).

55. On 6 November 2018, Mr Van Schaik had cause to email the Claimant in respect of an issue about low value leads:

> "*Please see below some constructive advice from Stewart. I understand John approached you in parallel to update real opportunities.*
> *I recommend to put some more effort in, this is your team score and the matter is rather low.*
> *Please advise plan/actions to improve on this*" (page 439).

56. On 26 November 2018, the Claimant was advised of his Q3 incentive plan result. His team did not meet its threshold, the Claimant met his individual order intake, but, again, he did not meet the minimum threshold for his additional personal objectives scoring 70 out of a possible 135 points (pages 454 – 455).

57. On 6 December 2018, Mr Van Schaik emailed the Claimant enquiring:

> *"how are you progressing with setting up structure and process to improve business success with PTTM and TGM? As discussed before I like to see a business case for having FSE and tools in territory" (page 456).*

58. In January 2019, the Claimant took a period of annual leave after the Respondent's brief Christmas shutdown but failed to reply to e-mails or make provision for cover in his absence.

59. On 6 January 2019, the Respondent's Business Development Manager had cause to email the Claimant as he had been chasing the Claimant's opportunities

updates. The Claimant said that he would "*clean them up*" by early the following week. However, Mr Holbrook replied:

> *"These opportunities were supposed to be cleaned up before Mark and your pipeline reviews in December. "Early next week" is too late! You are holding me up on issuing the SOP report. Please clean these up by Monday close of business your time"* (page 509)**.**

60. On 1 February 2019, a key client, KNS, emailed the Claimant:

> *"I tried to call you at your office and on your mobile but never managed to reach you. Could you please advise on the legal process review? Ts and Cs were sent more than a month ago..".*

61. The Claimant failed to reply, and the matter was referred to the Project Manager who emailed Mr Van Schaik asking:

> *"any idea on Paulo's location, KNS have chased him numerous times on various topics but no response?"* (page 525)

62. Accordingly, Mr Van Schaik emailed the Claimant asking for an explanation. The Claimant explained:

> "*I am not too well and the first time today this week looking back at my mailbox (and last week we were all in Czech for the sales meeting …) I will contact KNS asap*" (page 524).

63. Mr Van Schaik replied:

> *"the sales meeting is not an excuse. Furthermore, the request dates back 26 December. This is your single largest customer and they are sending reminders, can't reach you by phone? Unless I missed some critical information to make such judgement I consider this rather poor performance"* (page 523)*.*

64. The Claimant objected and said there was "*no poor performance on my side*" and gave his explanation and chronology of events (page 522).

65. Mr Van Schaik responded: "*we will discuss again the expectations during the upcoming performance review*" (page 522).

66. Additionally on 1 February 2019, Mr Van Schaik had cause to criticise all three RSDs due to the poor quality of the pipeline. In an e-mail to the Claimant he said:

> *"…..Unfortunately you were not on the call yesterday or the scheduled Performance review.*
>
> *The subject of the SOP report call yesterday was, as you could read from the invitation, the poor quality of the pipeline …..*

Month after month I have been asking the team to improve. The result is as poor as ever and I am not presenting this to the EXEC.

Knowing the importance of the report for planning purpose for the company, it is useless!..........

I have given Paul and Liam, and by means of this e-mail You, till Monday close of business to have the situation corrected. Failing which there will be mandatory pipeline reviews …….. I trust however that this is not needed as it will have consequences which will go beyond freezing incentives.

As advised before we can not have people bearing titles like Director and Manager when they are not Directing nor Managing their work" (page 521).

67. Approximately two weeks later on 14 February 2019, the Claimant emailed HR in the context of securing an extension to his visa to stay in Malaysia. He said:

> *"I understand that the timeline is very stretched and therefore all efforts should be focused on getting the visa extended in Malaysia at first.*
>
> *However, my intention and request to move to HK (Hong Kong) within months remains and certainly it cannot be silenced by Brush management, as my tenure in Malaysia was never agreed on a long-term basis, and such position openly opposes my personal and life goals which should be regarded as highly important by my employer.*
>
> *Mark Alvey's contract will not be extended further, (expiration in October 2019, and Lando Garro is not office based). Thus the requirement for a physical office in Malaysia is very limited and there is a full chance to move the office to another location as per my earlier point.*
>
> *I therefore suggest a short-term office lease extension, for instance till year's end to support my visa application, and make use of these months in 2019 to review and organise my move to HK, which I am actively ready to support "* (page 529).

68. Around this time Mr Van Schaik, Christian Lordereau, Group HR Director and the Respondent's CEO Chris Abbott met and discussed the Claimant's performance in the context of a proposed restructure of the sales team and APAC being the worst performing in the group. They considered that it would be difficult to place him on a performance improvement plan given his seniority and role within the Respondent. Accordingly, they agreed that Mr Lordereau would have a without prejudice conversation with the Claimant to explore if he was committed to working with the Respondent or whether he would be interested in a paid exit. Mr Lordereau is a trained lawyer with a full understanding and experience of without prejudice conversations. The Respondent was open to the idea that the

Claimant may wish to stay and focus on improving his performance rather than agreeing an exit.

69. On 5 March 2019, the Claimant was advised of his incentive plan results for Q4. The sales team hit its target and the Claimant met his individual order intake, but not the minimum threshold for his additional personal objectives achieving 50 out of a maximum of 125 points.

70. Ultimately, the Claimant achieved his sales target for 2018/19 due to a large order placed by a customer in need of an urgent replacement from the Respondent. The order was down to luck and not a consequence of any activity by the Claimant.

71. On 15 March 2019, Mr Van Schaik had cause to contact the Claimant again after the Claimant challenged his business targets for 2019. He said:

> *"Having said that and with all respect, you have Mark Alvey and three agencies in territory. After our last meeting with the agencies in Singapore I thought the expectations are very clear that you need to manage them better. Do you now have customer visit plans agreed and in place, is there a process how to qualify enquiries and where possible to merge them so we have less handling etc. Do we have a commitment for a value of business they will bring? From what I have seen there appears to be very little strategy in place, I miss any structured approach apart from just quoting on what comes up from whoever. We added Mark to the team to help out but are you occupying him properly and fully?"* (page 539).

72. The following day, Mr Van Schaik had to chase the Claimant for his input into a plan for the sales review meeting (page 541). The Claimant had been without access to a laptop whilst his was being repaired and had failed to request a temporary one or make alternative arrangements to continue doing such work.

73. Mr Van Schaik continued to chase the Claimant for outstanding work (page 637 and 640) and had to send a further reminder to him on 2 May for information to be provided for a quarterly operations business review. Mr Van Schaik explained the level of detail required and it was only at this stage that the Claimant alleged that BBP was not functioning properly on his laptop (p.673). If the Claimant was having difficulties with his access to BBP, he had not attempted to try and resolve them.

74. More generally, APAC's performance was in steep decline under the Claimant's responsibility. The 2019 pipeline coverage was only 70% compared with the Americas at 138% and EMEA at 129% (pages 576 & 582).

Singapore

75. Both Mr Van Schaik and Mr Lordereau planned to be in Singapore for a number of meetings and dinners with the APAC sales team and the Respondent's suppliers and distributors during 13–17 May 2019. Mr Van Schaik and Mr

Lordereau agreed that Mr Lordereau would have the without prejudice conversation with the Claimant during this visit.

76. Prior to the meeting in Singapore, Mr Lordereau contacted the Claimant on 8 May 2019 as follows:

> *"I know we are going to have dinner but I would like to have a more specific meeting about your role and how you are performing it. I would need you to tell me more about your relations with agents, how many, how is it going? Same with customers, could you give me an idea of how many, prospects in the region etc… How many have you seen since the beginning of 2019, how your agenda has been impacted by your enrolment in the Hong Kong MBA? How many days have you spent over there?*
>
> *I would appreciate if you could put all of that in writing prior to our meeting. I will be arriving in Singapore on Monday 13 later afternoon and will be available until Thursday 16 evening. Look forward to seeing you there"* (page 687).

77. The Claimant failed to provide this information in writing to Mr Lordereau.

78. On 13 May 2019, the Claimant was advised of his Q1 sales incentive plan results. His sales team did not meet its threshold, his regional booking target was below threshold and the Claimant failed again to reach his additional personal objectives achieving a total of only 31.3% (page 707).

79. On 13 May 2019, Mr Lordereau contacted the Claimant and arranged to meet him on 15 May 2019 at "*around 9.00am at the Swisshotel*?" (713). The Claimant responded that he was happy to meet at "*around 9.00am*" (page 712).

80. Both parties were clear that the meeting was scheduled for 9.00am (or close to) and Mr Lordereau confirmed that he would meet the Claimant in the lobby, and they would find somewhere to talk.

81. The Claimant suspected that Mr Lordereau would want to engage in a without prejudice discussion so, prior to their meeting, he researched typical settlement packages in the UK. He was conversant with the nature of a without prejudice conversation.

82. On 15 May 2019, the Claimant arrived at the meeting forty-five minutes late. He had not checked the precise location of the hotel beforehand and initially arrived at the wrong hotel and, further, left his own hotel only a few minutes before 9am thereby allowing insufficient time to arrive at the agreed time.

83. Mr Lordereau was understandably annoyed with the Claimant's late arrival which, alongside the Claimant's failure to respond to his e-mail of 8 May 2019, reinforced the performance concerns relayed to him by Mr Van Schaik.

84. At the meeting, Mr Lordereau asked the Claimant to explain why APAC was the worst performing territory and his performance more generally. The Claimant failed to provide a substantive response, nor did he demonstrate any desire to improve his performance. However, he confirmed his continued intent to relocate to Hong Kong to complete his EMBA and told Mr Lordereau that he was spending around a week every month physically in Hong Kong working on his EMBA, despite the Respondent having very little, if any, business there.

85. Given the Claimant's lack of engagement about his performance, Mr Lordereau asked him if he would like to speak on a without prejudice basis and have a protected conversation in relation to potentially agreeing an exit for him. The Claimant confirmed his willingness to have such a conversation.

86. Mr Lordereau explained that the Respondent was frustrated with the poor performance in APAC and the Claimant himself appeared to be frustrated that his plans to relocate to Hong Kong were not compatible with the Respondent's plans. Mr Lordereau suggested entering into a settlement agreement in which the Respondent would pay him three months' pay in lieu of notice and an ex gratia payment equivalent to three months' salary. Having carried out his research prior to the meeting, the Claimant was content to accept the offer of six months' pay. He was relieved because it would allow him to move to Hong Kong, focus on his EMBA and stay with his partner whilst receiving a settlement sum to support him.

87. The Claimant mentioned to Mr Lordereau that he had some outstanding expenses to claim but did not expand any further. Mr Lordereau said that they would be dealt with in the usual way, assuming that they had been incurred recently. The meeting was amicable, and the Claimant arranged to meet Mr Van Schaik that evening for a pre-arranged dinner.

88. Mr Lordereau did not '*make it clear'* to the Claimant at any time in this discussion (or any other discussion) that Mr Alvey was also to be dismissed because this was not the case, nor did he make any comment or inference about his or the Claimant's nationality.

89. That evening, the Claimant, Mr Lordereau and Mr Van Schaik had a further amicable conversation to discuss practicalities about the Claimant's flat, his car and the likely date that the Claimant would relocate to Hong Kong permanently.

90. The Claimant mentioned that he had three years' worth of expenses to claim (the receipts/evidence for which he had kept in a shoebox) but deliberately chose not to disclose or reveal the extent of them at that stage because he knew it would jeopardise the settlement discussions. Mr Van Schaik agreed to review the Claimant's unclaimed expenses but did not make a commitment to pay them.

91. The Claimant and Respondent departed on the evening of 15 May 2019 on amicable terms and the Claimant was advised that he would receive a draft of the settlement agreement.

92. On 17 May 2019, the Respondent disabled the Claimant's IT account and confirmed that internal communications about his departure would be made the following week.

93. Thereafter, the Claimant returned his rental car in a damaged state and, despite being obliged to report any damage to the Respondent, the hire company and the local police, he had failed to do so, showing little respect for property or local laws.

94. The Claimant did not undertake any work for the Respondent after 17 May 2019 and began the process of relocating to Hong Kong. In the meantime, the Respondent appointed the Claimant's successor, Mr Andrew Barker, who is a British national. Mr Barker joined the Respondent mid-financial year but was only prepared to commit to meeting a target of £7.5m (as opposed to the existing target which was £8m). This was agreed by Mr Van Schaik given that within the context of a £200m turnover, it was a marginal decrease for that year. Mr Barker's target remained at £7.5m in 2020.

Settlement negotiations

95. On 22 May, the Claimant was sent the first draft of the settlement agreement containing provision for payment of an ex gratia payment equivalent to three months' pay and three months' pay in lieu of notice.

96. Shortly after sending the first settlement agreement to the Claimant, Mr Lordereau became aware that the Claimant had returned his company car in a very poor condition with significant damage. Mr Lordereau contacted the Claimant directly to explain that they were going to reduce the value of his settlement package by £2,000 in recognition of the cost to the company to which the Claimant agreed. Thereafter, the Claimant returned his laptop in a highly damaged condition but failed to return his ipad.

97. As settlement negotiations commenced, the Claimant asked Mr Lordereau to contact him by e-mail and gave him his mobile number in Hong Kong (p.736). Thereafter, he asked for the address in the settlement agreement to be amended as follows:

> "*To amend the address in KL to C17-6 (instead of D29-5). FYI, my contact number in HK is ********** and, once this settlement procedure comes to an end, it will be the solely reliable contact.*
>
> *As to my place of stay in HK, although temporary, please refer to ******"* (page 787)"

98. Negotiations continued and the Claimant expressed on 29 May 2019:

> "*my sincere gratitude for helping make this somehow painful transition as smooth as possible"* (page 767).

99. On 5 June 2019, the Claimant emailed HR stating that he was *"fine to push this* [the settlement agreement] *through as quickly as possible"* (page 792). He also confirmed that he had appointed solicitors - "*I will give them a call in their early morning today to set up an immediate appointment, as it is my intention to settle the matter as soon as possible*" (page 784).

100. On 6 June 2019, the Claimant emailed Mr Lordereau stating:

> "*a deal can still be struck quickly and doing it before our lawyers are back will just make everything easier and more amicable. I am glad to work with you on that basis. Feel free to contact me directly to finalise the agreement*" (page 695).

101. Shortly thereafter, the Claimant submitted his outstanding expenses which amounted to £59,252.43, with some claims dating back to late 2015/2016.

102. The Respondent was shocked by both the amount of expenses claimed and the fact that the Claimant had failed to submit them earlier in accordance with the expenses policy which requires any expenses to be submitted within fourteen days.

103. The Respondent refused to make full payment in respect of the expenses (it limited its offer to £10,000) and the settlement negotiations broke down. If the Respondent had agreed to reimburse the Claimant's expenses in full, the Claimant would have happily signed the settlement agreement.

104. Given that settlement negotiations had broken down, the Respondent felt that the relationship was irreparable and had no choice but to conclude matters quickly and finally, and terminated the Claimant's employment by way of letter dated 30 July 2019:

> *"Further to our various meetings last may in Singapore, I write to notify you that Brush Electrical Machines ("the company") is terminating your employment with immediate effect. Your last day of employment is 3 July 2019.*
>
> *We will make a payment in lieu of notice and accrued holiday to you which will be paid direct into your bank.*
>
> *The reason for termination of your employment are as follows:*
>
> *You have been employed by the company since 5 October 2015 AMA Sales Director to grow our aftermarket and services sales in the Asia Pacific region, build a stronger portfolio and partners network. You have not been able to deliver any significant improvement on either of those counts. We have on the contrary seen a steep decline and have questioned several times your level of engagement. This has been confirmed by your willingness to focus on an MBA in Hong Kong and your repeated request to be based there knowing it is not a strategic location for the Generator business. You did confirm to me when we met in*

Singapore on May 17, 2019 that the tuition was taking more than a week and a half every six weeks of your time. This has more than confirmed that you really could not perform your duties with such an external commitment. The other point is that your relationship with our local partners and agents in the local market which have worsened significantly due to your lack of professionalism and inability to reply on time to enquiries and maintain a proper business relationship.

I also must refer to your behaviour, regularly turning up late at meetings, not filing your expenses in time if at all and the disastrous state of the company property you returned at the end of May, including ipad missing, broken laptop and severely damaged car" (page 825).

105. The dismissal letter was sent to an incorrect address and the Claimant did not receive it until 18 July 2018. Accordingly, his effective date of termination was 18 July 2018. He was not offered the right to appeal.

The law

Unfair dismissal

106. Section s.98 Employment Rights Act ("ERA") provides.

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

………

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

107. Section 122(2) ERA provides:

"(*2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."*

108. Section 123(6) provides:

"(1) Subject to the provisions of this section and sections 124, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

…..

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding".

109. The case of Polkey v Dayton Services Ltd [1988] ICR 142, sets out a principle that if a Tribunal finds that a dismissal was procedurally unfair but, on the evidence before it, can conclude that had a fair procedure been followed a fair dismissal would have occurred in any event then it may make a reduction in the amount of the compensatory award awarded.

110. We have had regard to the following further cases: Leach v OFCOM [2012] EWCA Civ 959; Willow Oak Developments Ltd t/a Windsor Recruitment v Silverwood and Others [2006] IRLR 607; Pheonix House Ltd v Stockman UKEAT/0058/18/00; Steen v ASP Packaging Ltd UKEAT/23/11; and, Parker Foundry v Slack [1992] IRLR 11.

Discrimination

Direct discrimination

111. Section 13(1) states:

"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

112. Section 23(1) states:

"(1) On a comparison of cases for the purposes of section 13, 14 or 19 there

must be no material difference between the circumstances relating to each case."

113. It is not necessary for a Claimant to have an actual comparator to succeed. The comparison can be with a hypothetical person, as long as the circumstances are not materially different.

Burden of proof

114. Section 136 EQA provides:

"(2) If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.

(3) But sub-section (2) does not apply if A shows that A did not contravene the provision".

115. We have had regard to the following cases: Igen Limited v Wong [2005] IRLR 258,; Madarassy v Nomura International PLC [2007] ICR 867; Laing v Manchester City Council [2006] IRLR 748 EAT; Martin v Devonshires Solicitors [2011] 352 EAT; Nagarajan v London Regional transport 1999 ICR 877; Talbot v Costain Oil, Gas and Process Ltd and ors 2017 ICR D11; Gellor and anor v Yeshurun Hebrew Congregation 2016 ICR 1028 EAT; Deman v Commission for Equality and Human Rights and ors 2010 EWCA Civ 1279 CA; McCorry v McKeith [2016] NICA 47; and, Veolia Environmental Services Ltd v Gumbs UKEAT/0487/12/BA.

Unauthorised deductions from wages

116. Section 13 ERA states:

"(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or

combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.”

Submissions

117. The Tribunal had the benefit of written closing submissions from both the Claimant and the Respondent and the Respondent, together with brief further oral submissions which were helpful. The Claimant’s submissions run to two hundred and one paragraphs and the Respondent’s submissions to sixty-nine. They are not set out in this judgment but have been considered.

Conclusions

Jurisdiction

118. We have found as fact that the Claimant was dismissed with effect from 18 July 2019. The Claimant entered into early conciliation between 20 September 2019 and 3 November 2019 and the ET1 was submitted on 6 November 2019. Accordingly, the Claimant’s claim is in time and the Tribunal has jurisdiction to hear it.

Unfair dismissal

119. The Respondent conceded prior to this hearing that the Claimant’s dismissal was procedurally unfair. However, it asserts that his dismissal was substantively fair for some other substantial reason, namely that there was an irreparable breakdown in the relationship between the Claimant and the Respondent.

120. The Respondent’s alternate submission is that if the Claimant was dismissed on 17 May 2019 (which the Claimant suggested during the course of this hearing), then his dismissal was fair by reason of capability.

121. Turning to the facts, we are satisfied that the Claimant was dismissed by way of letter dated 3 July 2019, albeit he did not receive it until 18 July 2019.

122. We are also satisfied that the reason, or principal reason, for the Claimant’s dismissal was ‘some other substantial reason’. In arriving at our conclusions, we reminded ourselves of the expectations of the Claimant’s performance given that he held a senior position at the Respondent attracting a substantial remuneration package, alongside the circumstances in play at the time of his dismissal.

123. The predominant reason for the Claimant’s dismissal was capability and it is clear from evidence in the bundle that the Claimant’s performance was poor. This was apparent from early on in his employment when he failed to supply documents required to support his visa application in a timely manner – a simple, yet crucial, task - thereby demonstrating the Claimant’s inability to prioritise matters. The same can be said of the Claimant’s failure to submit his expenses over a three-year period amounting to circa £60,000 (more below).

124. We have seen evidence of the Claimant's poor performance more generally and accept that Mr Van Schaik was clear with the Claimant that he was not performing at an acceptable level – e.g. "*Frankly speaking I am not impressed*" (page 381/2) and "*As advised before, this is not good enough*!" (page 431). Mr Van Schaik gave evidence that he was surprised that he had to remind someone of the Claimant's seniority to set up calendar reminders and the e-mails in the bundle demonstrate Mr Van Schaik's need to regularly chase him for information, as well as client's needs being disregarded.

125. Mr Lordereau gave evidence that because of the Claimant's seniority, the Respondent would not typically performance manage in the usual way i.e. by warnings etc. Accordingly, he agreed with Mr Van Schaik and Mr Abbott to have a without prejudice discussion with the Claimant to see if he was amenable to an exit. We accept that the Respondent was open to the concept that he might not and had the Claimant not indicated his willingness to enter into a settlement agreement, they would have looked at alternative ways of managing his performance.

126. Nevertheless, the settlement agreement suited the Claimant perfectly as it allowed him to relocate to Hong Kong permanently and pursue his EMBA. He says in his witness statement that "*I want to make it very clear that I did want to relocate to Hong Kong and my e-mail to HR on 14 February 2019 makes that clear*" (para 109) and "*tying me to Malaysia opposed my personal and life goa*ls" (para 111). The Claimant had done his research on settlement packages and was happy with the total offer of six months' pay but deliberately chose not to disclose the extent of his expenses to both Mr Lordereau and Mr Van Schaik on 15 May 2019 knowing it would jeopardise the settlement discussions (his prediction being entirely correct). Thereafter, he willingly and gratefully agreed to leave the Respondent under the terms of a settlement agreement.

127. The Claimant confirmed in evidence that if the Respondent had agreed to pay his expenses, he would have signed the agreement. However, the Respondent felt the Claimant had acted unreasonably in failing to file three years' worth of expenses. The Claimant's neglect in doing so was not only another example of his inability to keep on top of things, but the Respondent's legal and financial obligations would not permit payments of those expenses in any event.

128. For completeness, we are satisfied that Mr Van Schaik did not agree to authorise the expenses in Singapore, he simply agreed to review them. Ultimately, the Respondent, via its solicitors, refused to pay the full amount of expenses although did offer £10,000 as a payment towards them. If the Claimant had not insisted on repayment in full of his expenses, this case would not have been before us. The Claimant was happy with the remainder of the terms and wanted to resolve matters quickly to suit his personal circumstances. It was his own negligence in failing to submit his expenses that caused the negotiations to break down.

129. Once the negotiations had broken down, the Respondent found itself in a position where it had an under-performing employee who was not in possession of any company equipment, had not undertaken any work for it since 17 May 2019, was

claiming £60,000 in unclaimed expenses and by this time had to all intents and purposes relocated to Hong Kong. Accordingly, the Respondent needed to draw a line under the employment relationship, and they did so way of the letter dated 3 July 2019 dismissing him. The Claimant was paid his notice in lieu and any outstanding holiday pay.

130. Given the prevailing circumstances, we are satisfied that collectively they fall within 'some other substantial reason' as a potentially fair reason for dismissal. There was no single causative reason for the dismissal, rather it was the combination of all the factors in play once exit negotiations had broken down which led the Respondent to believe that the relationship had irretrievably broken down.

Polkey/Compensatory award

131. As noted above, the Respondent has conceded that no procedure was followed and, therefore, the Claimant's dismissal is procedurally unfair. However, it submits that any compensatory award should be reduced because of a *Polkey* reduction – i.e. that he would have been fairly dismissed in any event had a fair procedure been followed.

132. Given the circumstances described above, we are entirely satisfied that the Claimant would have been fairly dismissed if a fair procedure had been followed. Firstly, we are satisfied that the Claimant's performance in his role was poor. Whilst no formal capability process was undertaken, Mr Van Schaik highlighted his concerns to the Claimant as and when they arose, advised him of what the expectations of him were and what he should do to meet them. The Claimant had ample opportunity to improve but failed to do so and spent more and more time in Hong Kong focussing on his EMBA and consequently less time on his work.

133. The Claimant's performance led directly to the offer of a settlement agreement on 15 May 2019. It was obvious to us that from the Claimant's perspective, the offer of a settlement agreement was the ideal solution to the situation he found himself in – struggling in a role when his desire was to leave Singapore to focus on his EMBA in Hong Kong. He confirmed his acceptance of the main terms on 15 May 2019 and engaged amicably in respect of the agreement itself thereafter.

134. Subsequently, the Claimant returned his laptop and car in a highly damaged state. The submission of his expenses revealed his significant failure to adhere to the Respondent's expenses policy allowing circa £60,000 worth of expenses to accrue. He was re-locating to Hong Kong and ceased carrying out duties with effect from 17 May 2019. Settlement negotiations were going well until the Claimant revealed the extent of his unclaimed expenses which ultimately led to the settlement agreement being abandoned.

135. At this point, the Respondent was of the view that the relationship had irretrievably broken down and we are satisfied that was a reasonable view to form and had it followed a fair procedure, a fair dismissal would have been the result.

136. If the Claimant had declined to agree an exit on 15 May 2019, we are satisfied that the Respondent would have commenced managing his performance and, in light of the Claimant's commitment to his EMBA in Hong Kong, his unwillingness to acknowledge his poor performance or improve (during the conversation with Mr Lordereau on 15 May 2019) he would have been fairly dismissed for capability.

137. Given the prevailing circumstances we are satisfied that had the Respondent followed a fair procedure, whether it be by reason of capability post 15 May 2019 or some other substantial reason after the settlement discussions broke down, the chance of the Claimant being fairly dismissed by 18 July 2019 was 100%. Accordingly, applying the principle in *Polkey*, we reduce his compensatory award by 100%.

138. Alternatively, we would also have been satisfied that the Claimant's compensatory award should be reduced by the same amount by reason of his actions prior to his dismissal as explained above. We are satisfied that the Claimant's behaviour amounted to blameworthy conduct leading directly to his dismissal.

Basic award

139. Turning to the basic award, the Respondent submits that it should be reduced by 100% because of the Claimant's contributory conduct before his dismissal. We are entirely in agreement with this submission and are satisfied that it is just and equitable to do so for the following reasons: – the Claimant's poor performance in a senior role; the Claimant focussing on his EMBA resulting in a neglect of his duties for the Respondent; his neglect of the laptop and car and loss of the i pad; his failure to adhere to the expenses policy resulting in a claim for circa £60,000 worth of expenses; his deliberately withholding that information on 15 May 2019; and, his relocation to Hong Kong – all of which we consider to be blameworthy conduct which caused his dismissal.

140. Again, the context of the Claimant's dismissal is important. He willingly entered into without prejudice negotiations but deliberately withheld vital information about his expenses. He would have signed the settlement agreement happily if the Respondent had paid them. The Respondent had no idea that the Claimant had accrued such a significant amount of expenses and was reasonably not prepared to pay them. The fact that the Claimant had failed to comply with the Respondent's policy led to the breakdown of the settlement negotiations and therefore his dismissal. He was the author of his own misfortune. Accordingly, it is just and equitable to reduce the Claimant's basic award by 100% by reason of his contributory conduct.

141. Given our findings in respect of the basic and compensatory awards, no ACAS uplift is possible. Even if there was an award to uplift, we would have been satisfied that taking into account all the relevant facts and circumstances surrounding the Claimant's dismissal an uplift would not have been just and equitable.

Race discrimination

The Claimant's case

142. As we note above, the Claimant's claim in this regard has changed substantially from that pleaded in his originating claim in which he says:

> *"C is Italian and non-British. C was the only Italian and non-British national working in Aftersales within the Asia Pacific region and, to his knowledge, the only Italian and non-British expatriate in Brush Electrial Machines Limited.*
>
> *C contends that his dismissal and the manner of his dismissal (details outlined within the unfair dismissal section above) amounted to direct race discrimination because of the Claimant's nationality and/or non-British nationality he was treated less favourably then Mr Mark Alvey who was not dismissed and who is British and other British sales staff who he contends did not hit their sales target.*
>
> *Mr Alvey was a colleague of Claimant's and his performance was inferior to the Claimant's in 2018 and 2019.*
>
> *In May 2019 the Respondent raised its concerns over the first quarter (2019) aftermarket sales results for Asia and Pacific region and indicated to the Claimant its intention to dismiss both the Claimant and Mr Alvey.*
>
> *Mr Alvey was employed on a fixed-term contract and, rather than dismiss him, the Respondent extended his fixed-term contract in October 2019 for a further year.*
>
> *R has replaced C with a British National who is based in Singapore.*
>
> *In the alternative, the dismissal of the Claimant was less favourable treatment than an appropriate hypothetical comparator of a different race in materially the same circumstances as the Claimant…" (pages 19 – 20).*

143. At the closed preliminary hearing on 27 January 2020, the Claimant confirmed his pleaded case i.e. that the manner of his dismissal (failure to follow a procedure) and the dismissal itself was less favourable treatment because he is not a British national.

144. The Claimant's case subsequently changed in his witness statement. He alleges that Mr Van Schaik would refer to South East Asian people in derogatory terms and on 15 May 2019, he observed that the Claimant was becoming "*localised*" and picking up bad habits and unprofessional behaviour. However, the Claimant was unable to provide specifics on the remarks. He simply says in his witness statement at paragraph 20:

'*Mr Van Schaik had made his prejudice towards South East Asians very evident, expressing on several occasions generic complaints about their behaviour, trustworthiness and professionalism. During the talks following the dinner with SWTS on 15 May, he doubled down on the complaint that Mr Lordereau made about my alleged late arrival to the meeting with him that very morning, with the striking remark that I had spent too much time in Asia, and so had picked up bad habits and unprofessional behaviour of locals'*.

145. He also alleges that on 15 May 2019, Mr Lordereau "*was harsh and unpleasant and explained to me that when in a professional setting, he was Northern European rather than Southern European, referring to his double French – British nationality and that this was why he was angry with me for arriving late at the meeting… However, the sharp and unfair comment on my behaviour in line with the stereotype he had a Southern European opposed to his Northern European prejudice, inflicted on me dismay and humiliation… That very evening, I would also learn that such kind of too quick, shallow and judgemental approach based on people's nationality and country of origin was openly shared by Mr Van Schaik, who would instead manifest as a detractor of the population of a huge, whole area of Asia*" (paras 125 and 126 of the Claimant's witness statement). The Claimant made little or no reference at all to his initial pleaded case in his witness statement.

146. During the hearing itself, it was put to Mr Van Schaik in cross examination that he would often refer to South East Asians as unprofessional and untrustworthy and made comments in that regard on 15 May at 2019 in front of South East Asian business colleagues and that he had a willingness to "*stereotype and generalise*". Mr Van Schaik rebutted the allegation as "*ridiculous*" and pointed out that he would have been in '*some trouble'* had he made such comments in front of South East Asian colleagues.

147. Mr Jones cross examined Mr Van Schaik on paragraph 9 of his witness statement in which he says *"rather, over time my impression was that Paulo did not invest the time and energy that was needed in order to properly deal with the requirements of his role…"* It was put to Mr Van Schaik that he was inferring that the Claimant was '*lazy'* amounting to unconscious bias in the stereotype attached to the Claimant. Mr Jones went on to explain that the stereotype of Italians emerged from comments by Jean Claude Junker in 2018 that Italians needed to work harder. It was suggested that Mr Junker's comments reinforced an existing stereotype which followed the financial crisis and has subsequently '*been reinforced in the handling of the pandemic*'.

148. It is of course, the Respondent's case that the Claimant was underperforming. In cross examination, Mr Van Schaik explained paragraph 9 of his statement in context of underperformance and the fact that the Claimant was focussing his energy on the wrong things or failed to follow up upon matters. He described him as a "*busy fool*" and not that he was lazy – rather that he had an inability to focus and prioritise in order to get the desired results for the Respondent. The Claimant seems to have read something into Mr Van Schaik's comments that is

simply not there and used this as a basis of an allegation of unconscious bias leading to direct race discrimination.

149. In cross examination, the Claimant was asked why he made no mention of unconscious bias in the original pleadings. He explained that it was a "*strategy*" to withhold it.

150. In the agreed list of issues produced at the end of the substantive hearing, the Claimant's case of direct discrimination reverts to his original pleaded case and asserts that Mr Lordereau's comments and the more generic ones by Mr Van Schaik are background facts.

151. The shifting nature of the Claimant's discrimination claim causes us concern and to doubt not only his credibility but also his belief in his own case. The Respondent submitted that his initial allegations were not dealt with in any detail in his witness statement because the Respondent had rebutted the allegation that he was dismissed because of his nationality in its provision of further information setting out the extensive list of different nationalities employed by the Respondent. This seems to us to be a likely explanation.

<u>Conclusions</u>

152. In arriving at our conclusions on discrimination, we have referred to the background facts in the agreed list of issues relied on by the Claimant in support of his claim that his dismissal and the manner of his dismissal (i.e. that the Respondent did not follow a capability procedure) amounted to direct race discrimination because he was not a British national.

The Claimant's workload being a significant contributing cause/influence on his performance and personal objectives

153. The Claimant relies on his workload as being a significant contributing cause/ influence on the performance issues relied upon by the Respondent and his failure to meet his personal objectives contained within the quarterly bonus incentive scheme. He was at great pains to stress throughout this hearing that he was effectively overworked and under resourced but provided no credible evidence to support that assertion. He said that he asked Mr Van Schaik on numerous occasions for additional resource who refused to authorise it. Mr Van Schaik on the other hand said that at no point did the Claimant advance a business case to support his request for additional resource and we saw no evidence of the same in the bundle. Absent that information, and given the Claimant's pipeline, figures and performance overall, this was a reasonable view for Mr Van Schaik to take.

154. Notably, Mr Dickson (the Claimant's technical support in Asia) resigned because he had insufficient work to do. This is highly telling of the Claimant's productivity. Even if the Claimant considered himself busy, we are satisfied with Mr Van Schaik's evidence that he busy doing the wrong things. If the Claimant genuinely needed additional resource, it was entirely within his gift to put forward a business case to Mr Van Schaik to justify it, but he failed to do so.

Resource

155. The Claimant alleges that he was provided with less resource than his successor. Again, we are entirely satisfied with Mr Van Schaik's evidence that the Claimant did not need additional resource. The Respondent accepts that his successor was provided with additional resource, but Mr Van Schaik explained that he developed a rationale business case for future development which justified it, whereas the Claimant did not.

Sales performance

156. The Claimant alleges that his sales performance was better than Mr Alvey and Paul Higgs. Dealing with Mr Alvey first, Mr Alvey was the Claimant's subordinate and it is entirely inappropriate to compare the Claimant's treatment with him given their differing seniority and responsibilities. The Claimant seemingly undertook a paper-based exercise to support his contention but in our view, sales performance alone is not material. The Respondent accepts that the Claimant met his sales target for 2018, albeit says that this was though luck (see paragraph 70). However, the Claimant consistently ignores the fact that he failed to meet his personal objectives each quarter. Simply meeting a sales target was not the paramount purpose of his role – his responsibilities were far wider than that so sales performance in isolation is misleading and out of context.

Dismissal of a Czech Sales Manager in Mr Higgs' region whilst Mr Alvey survived dismissal

157. The Claimant has produced no evidence in support this contention so we cannot draw any inference from it.

Non-disclosure of Mr Higgs' sales figures

158. The Claimant also relies on the Respondent's non-disclosure of Mr Higgs' sales results in the document. We see no reason why the Respondent was obliged to provide this evidence in light of the Claimant's pleaded case at the time and draw no inference from the fact that it did not.

2018 sales performance – luck?

159. The Claimant placed great emphasis on the fact that he met his financial sales targets in 2018 to counter the Respondent's claims about his performance. In his originating claim he says that he exceeded his individual sales target in 2018 and reached 98% of the regional targets. He was awarded all four quarterly sales bonuses in 2018 and his after-market sales results for that year were among the highest over the last few years and significantly higher than the last six-year average. However, Mr Van Schaik gave evidence that the only reason the Claimant achieved his financial target was by luck because a customer placed a large order in the value £700,000. Absent that order, he would have failed to meet his target and, therefore, it was not in consequence of any activity on the Claimant's part.

160. It is telling that the Claimant fails to mention that he failed to reach the minimum threshold for the additional personal objectives. For 2018, out of a maximum score of 25 points for each quarter, the Claimant scored 7 for Q1, 10 for Q2, 12 for Q3 and 10 for Q4. He did not even hit half the available points in any given quarter which clearly points to under performance.

APAC's performance

161. The Respondent says that the Claimant's region, APAC, was its worst performing region. The Claimant denies this, but the documents support the Respondent's case entirely. The Americas regional overview shows that the 2019 pipeline coverage was 138% (p.576) and EMEA coverage was 129% (p.582). However, APAC coverage was only 70%. We simply cannot understand why the Claimant asserts that his region was not the worst performing in the face of this documentary evidence. Indeed, he spent much time explaining why his coverage was low, thereby accepting albeit not expressly, that it was in fact low.

The Respondent's criticism of him for pipeline reporting in February 2019 which he said was specific to the Claimant. The Claimant says that Mr Van Schaik's criticism was aimed at the other two RSDs including P Higgs

162. It may well be the case that Mr Van Schaik had cause to criticise the other two RSDs but we are not satisfied that one criticism in isolation is comparable to the Claimant's overall circumstances.

Mr Higgs' nationality

163. The Claimant relies on the fact that Mr Higgs is a British national but that is as far as he takes it. He has failed to advance any evidence to suggest that Mr Higgs was recruited because of his nationality. We are entirely satisfied that the Respondent recruits its employees from a vast range of nationalities and Mr Higgs' nationality is simply a fact of no consequence. In any event, the Claimant seemed to abandon this case in his witness statement yet reintroduced it through the list of issues – presumably because the number of expatriate employees who are not British far exceeds those who are.

Mr Barker's sales targets

164. The Claimant points to the sales targets being reduced for Mr Barker in 2020. Mr Van Schaik explained that targets are set early in each year and once set are '*cast in concrete'*. The target for 2019 was £8m. Mr Barker joined the Respondent mid-year but was only prepared to commit to meeting a target of £7.5m. This was agreed by Mr Van Schaik who further explained that within the context of a £200m turnover it was a marginal decrease for that year and remained at £7.5m in 2020. We have no reason to doubt Mr Van Schaik's explanation and therefore accept it.

Changes to the reason for the Claimant's dismissal/witness evidence regarding the pipeline

165. The Claimant relies on what he says are changes to the reasons provided for his dismissal, but we fail to see what they are. In our view, the Respondent's case has always been consistent in respect of the Claimant's performance and the reasons for his dismissal in July 2019 as set out in the dismissal letter. The documentary evidence in the bundle supports its case.

166. The Claimant also relies on Mr Lordereau's witness statement in which he says that the Claimant's pipeline for future sales in APAC was "*virtually non-existent"* but his response in cross examination that it was "*not growing fast enough*". We do not see that in the overall context of the Claimant's performance, particularly given that Mr Lordereau was not involved in the Claimant's direct line management, that this points to a change in the Respondent's case.

The Respondent's evidence

167. The Claimant relies on the Respondent's "*unreliable and unconvincing evidence*". As above, we have accepted the Respondent's evidence as credible and therefore, do not accept the Claimant's submission that it was unreliable and unconvincing – on the contrary, we found it to be reliable and convincing.

Respondent's supporting evidence

168. The Claimant also says that the Respondent relies on issues without any supporting evidence e.g. relationship issues with colleagues. We have seen examples of the Claimant's colleagues' frustration at pages 204 and 525 so we reject the submission that the Respondent does not have supporting evidence in respect of the matters that led to the Claimant's dismissal. As highlighted above, there are numerous documents in the bundle supporting the Respondent's case.

Failure to follow a dismissal procedure

169. The Claimant relies on the Respondent's failure to follow any dismissal procedure. We deal with the Respondent's lack of dismissal procedure under the section of unfair dismissal. However, we are entirely satisfied that the Claimant was dismissed without a procedure not only because of the senior nature of his position, but also because of the circumstances arising at the time. The parties had agreed an amicable departure as we have set out in our findings of fact. Once settlement negotiations had broken down the Respondent needed to quickly draw a 'legal' line under the employment relationship so to speak, given that in its view the breakdown in the relationship was irreparable and the Claimant was in Hong Kong.

Comments by Mr Lordereau

170. The Claimant relies on Mr Lordereau allegedly saying that '*he was Northern European rather than Southern European'* and that was why he was angry when the Claimant arrived late to their meeting on 15 May 2019. As above, we do not find that Mr Lordereau made these comments and his frustration with the Claimant's late arrival was justified given they had agreed to meet at around

9.00am and the Claimant had failed to leave enough time to arrive on time or check the exact location of the hotel.

Generic complaints by Mr Van Schaik

171. The Claimant also relies on the alleged but unspecified comments by Mr Van Schaik towards South East Asians, but we do not accept that Mr Van Schaik made any comments in this regard at all. The Claimant has failed to specify exactly what it is that Mr Van Schaik allegedly said which is somewhat implausible in light of the level of detail he provides in his witness statement regarding other matters – even to the point of the clothes he was wearing on 15 May 2019.

The perception that the Claimant was lazy

172. The Claimant also relies on the perception that the Claimant was '*lazy*'. Again, we have dealt with this above. Mr Van Schaik was simply explaining how the Claimant was dedicating his energies in the wrong way and does not call him lazy.

No British employee being dismissed by letter

173. The Claimant alleges that no British employee has been dismissed by letter '*without any capability process which is unreasonable and demands a credible explanation'* but takes this allegation no further in his witness evidence. We set out our findings on why the Claimant was dismissed by letter above.

A reduction in non-British ex pats

174. Finally, the last supporting fact relied on by the Claimant is a reduction in non-British expats. This was not a point that was explored by the Claimant in the hearing presumably because the proportion of non-British expatriates far exceeds the number of British expatriates.

Burden of proof

175. The burden of proof is on the Claimant to prove facts which could point, in the absence of any other explanation, to discrimination having occurred. If the Claimant can establish a prima facie case, the burden of proof shifts to the Respondent.

176. We are mindful that it is unusual to find direct evidence of discrimination. In arriving at our conclusions, we have stood back and assessed our findings of fact cumulatively and the totality of the relevant circumstances. We have assessed the credibility of the witnesses including the motivations of the Respondent in why it acted as it did.

177. We are satisfied that the background facts on which the Claimant relies are explained in context by the Respondent in consequence of the Claimant's poor

performance in a senior and highly paid role. Evidence of the performance issues are clearly documented throughout the bundle of documents.

178. The Claimant has not advanced any evidence to demonstrate that he was overworked and under-resourced as he alleges and that his performance was in any way the Respondent's 'fault'. The Claimant asserts that he was a high performer by reference to his meeting his 2018 sales target. However, it is telling that he chooses to ignore the fact that he consistently failed to meet his personal objectives and was not even close to meeting them. His remit was far wider than sales alone and we have seen from the contemporaneous evidence in the bundle that he was failing in his dealings with channel partners and key customers. He did not keep the BBP up to date which is an essential tool in the Respondent's forecasting and was criticised in this regard by Mr Van Schaik on more than one occasion. Despite this, his efforts did not improve. Additionally, we have seen evidence that from the outset the Claimant was unable to keep on top of crucial administrative tasks such as providing documents in support of his visa application and the filing of his expenses.

179. The Claimant asserts that his annual sales target was higher than his successor, but we accept Mr van Schaik's evidence that Mr Barker was only prepared to commit to a lower target as a condition of his recruitment. Further, the additional resource provided for him was in a consequence of a business case in support, something which the Claimant failed to provide

180. Once the Respondent decided that it needed to address the Claimant's performance, the parties entered into settlement discussions which were amicable and positive until the Claimant revealed the extent of his expenses. The Respondent's shock on learning their value was justified. Furthermore, the Claimant deliberately withheld the extent of them from Mr Lordereau and Mr Van Schaik knowing that they would affect the settlement negotiations.

181. The Claimant agreed at the hearing that if the Respondent had paid his expenses, he would have signed the settlement agreement. He had no concerns about discrimination at the time and no such issues were raised by his solicitors during the course of negotiations, even when those negotiations became fraught after the disclosure of the Claimant's expenses.

182. When the negotiations broke down the Respondent was in a position where it had a poor performing employee who had not worked for it since mid-May, who had returned property in a state of disrepair, had to all intents and purposes relocated to Hong Kong and had incurred £60,000 worth of unclaimed expenses. We are entirely satisfied that this was the reasons for his dismissal were for those cited in the dismissal letter and the lack of procedure was simply because the Respondent wanted to bring the employment relationship to a formal end quickly given the breakdown in the settlement discussions. It was unrealistic in the circumstances for it to expect that the parties could return to any form of working relationship.

183. The Claimant relies on Mr Alvey as a comparator, but he is not an appropriate comparator given that his material circumstances were not the same at the

Claimant. Mr Alvey was in junior role to the Claimant and was his direct report with differing responsibilities and on a fixed-term contract. The correct comparator is a hypothetical comparator whose material circumstances were the same, but of British nationality.

184. In assessing the witness evidence, we had significant concerns about the Claimant's credibility. His allegation of race discrimination changed dramatically from the original pleaded case in his witness statement and throughout the course of the hearing but subsequently reverted to the original case in his submissions. Our concerns were heightened after his evidence that he had withheld his allegation of unconscious bias by way of '*strategy*'. Even if this had been his original case, we are satisfied that Mr Van Schaik and Mr Lordereau satisfactorily rebutted such allegations and we have not been able to infer that there was any unconscious bias on their part – either towards Italians, South East Asians or any other nationality.

185. Further, the Claimant has not explained why, in his view, the Respondent has discriminated against him because he is Italian and not British in the context of a highly diverse workforce. Again, we conclude that this is because the breakdown of expatriate non-British employees provided by the Respondent undermines in his case entirely.

186. In conclusion, we have not been able to draw any inferences from the primary facts from which we could conclude that the Claimant was treated less favourably than an appropriate comparator. We have examined each background fact and considered them collectively and are entirely satisfied that such a comparator - who was underperforming, not devoting his time to his duties, spending one week out of every four in Hong Kong, who returned company property in a state of disrepair and then claimed £60,000 worth of outstanding expenses - would also have been subsequently dismissed in the same manner for the same reasons following the breakdown of settlement negotiations. The Claimant has not persuaded us that there are any facts that would justify us drawing an inference of discrimination. As such, the burden of proof does not shift to the Respondent and the Claimant's claim fails.

187. Even if we are wrong on that and the burden of proof had shifted, we are satisfied that the Respondent has not only given credible explanations about the background facts, but also about the reason for and manner of the Claimant's dismissal. It would, therefore, discharge the burden of proof. We are satisfied that its actions were in no way motivated by or because of the Claimant's nationality.

188. Accordingly, the Claimant's claim of direct discrimination fails and is dismissed.

Unauthorised deduction from wages

189. The Respondent accepts that if the Claimant's effective date of termination was 18 July 2019 it owes him wages for the period 4 July 2019 to 18 July 2019 (point 16 of the list of issues).

190. However, we considered its submissions that the Claimant was still an employee of the Respondent but undertook no work for it from 17 May 2019 and was not therefore '*ready and willing to work'*. We are satisfied that the parties were in settlement negotiations, 17 May 2019 was not the proposed termination date within the terms of the settlement agreement (such matter being subject to negotiation), the Respondent had not expected the Claimant to undertake any work and the employment relationship continued until he learned of his dismissal on 18 July 2019. Had the settlement agreement concluded, the Respondent would have paid him up to and including the agreed termination date. Accordingly, we find that he is entitled to be paid for the period 4 – 18 July 2019 and his claim of unauthorised deductions from wages succeeds.

191. The matter will be listed for a remedy hearing if the parties are unable to agree remedy between themselves.

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Employment Judge Victoria Butler

Date: 24 August 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS

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